ABDUL WAHAB BIN KACHI MYDIN v. GAN AH HOE

[O.C.J. (Arulanandom J.) March 10, 1977]
[Penang — Civil Suit No. 182 of 1974]

Negligence — Road traffic — Right of motor-car drivers and motor-cyclists — Driver of motor-car solely negligent.

Damages — Leg injuries and 2½" shortening — Quantum assessed.

The plaintiff, a labourer, sustained the following injuries when his motor-cycle collided with a car driven by the defendant:—

(i) 2½" shortening of the right lower limb, and
(ii) deformation of the knee-joint restricted to about 30° and fixed in an extended position.

Held: (1) the evidence showed that the defendant when she was overtaking cyclists or trishaws swerved into the path of the plaintiff's motor-cycle and collided into the motor-cycle when the plaintiff was riding on the correct side of the road, and in doing so was negligent and liable in damages to the plaintiff;

(2) general damages in the sum of $27,000 ($6,000 for loss of future earnings and $21,000 for pain and suffering and loss of amenities) were awarded to the plaintiff.

CIVIL SUIT.

Triptipal Singh for the plaintiff.

Lim Ewe Hock for the defendants.

Arulanandom J.: In this case the plaintiff claimed damages from the defendant for personal injuries and other losses suffered by him as a result of an accident where the car driven by the defendant collided with his motor-cycle which he was riding.

According to the plaintiff he was riding his motor-cycle Reg. No. PD 7328 on his correct side of the road on Perak Road from the direction of Dato Kramat Road towards Jelutong Road at about 8 p.m. on August 12, 1973 when the defendant so negligently drove her car Reg. No. PA 996 that it came onto his side of the road and knocked into him. According to the plaintiff he was riding his motor-cycle about 8' from the left side of the road and there were other cyclists to his left. He said he could not say why the car swerved on to his side of the road but later corrected himself in cross-examination after being reminded about his statement of claim and evidence in the lower court that the defendant overtook a trishaw. He was also cross-examined at length about the discrepancies in his police report and evidence in the court below about the exact location of the accident but these discrepancies are not material because the issue before the court is whether accident was caused by the negligence of the defendant and the exact location of the accident is evidenced by the sketch-plan.

Plaintiff was supported in his allegations of negligence on the part of the defendant by PW5 who is a trishaw pedlar who was plying his trade in the same vicinity and witnessed the accident. According to this witness he was riding his trishaw on the same road but in the opposite direction when defendant overtook his trishaw and then overtook some cyclists and in doing so encroached onto the path of the plaintiff and collided with him. This witness was again cross-examined at length about minor discrepancies about distances but I saw no reason to reject the substantive part of his evidence for I was satisfied he was telling the truth to the best of his recollection to the court. He was unshaken in his evidence that the defendant's car overtook him, then swerved to the left and then in overtaking two cyclists ahead swerved sharply to the right, encroached onto the path of the plaintiff and collided with the plaintiff's motor-cycle.

The sketch-plan which was included in the Agreed Bundle of Documents marked 'A' on pages 5 and 6 is of some assistance in establishing where the accident took place. According to the sketch-plan, the Perak Road at the scene of the accident is 29 ft. 07 in. wide. There is no centre white line. 'K' is the area where broken glass has fallen and according to the evidence the front offside headlight of the defendant's car was broken and the glass shattered so it could be assumed that the glass was from the headlamp of her car. 'K' is quite near 'G' the point at which the scratch-mark on the road commences. The scratch-mark ends at 'H' where the motor-cycle was lying. The reasonable conclusion one has to come to is that the scratch-mark was made after the motor-cycle had fallen down after the collision. The point 'G' is 9 ft. 11 in. from the left edge of the road facing Jelutong, i.e., the left side of the road on which the plaintiff was proceeding. The road being 29 ft. 07 in. the middle of the road would be about 14 ft. 5 in. from either edge. Hence the collision definitely took place on the plaintiff's side of the road and for that to have happened the defendant must have encroached onto the plaintiff's path. The position of the car in the sketch-plan is meaningless as the car was moved after the accident and neither its distance from the edge of the road nor its line of direction can be of any assistance to the court.

The defendant in her evidence stated that at the time and place of the accident she was driving her car at about 8' or 9' from the edge of the road on her correct side and that she was driving at about 10-20 m.p.h. She further stated that there were cyclists and motor-cyclists coming from the opposite direction and in the course of one motor-cycle overtaking another the plaintiff's motor-cycle collided with her front offside headlamp and the plaintiff was injured. For reasons below, the court could not accept her evidence as the true or correct version of how the accident happened and the court therefore rejected her evidence. If her version was correct that she was only driving at about 8' or 9' from the edge of the road, allowing a width of about 4—5' for the car, it still would not have been encroaching onto the wrong side of the road as at the most the offside fender would only be 13.5' from the edge of the road on her side and the middle of the road is 14.5' from either edge.

From the evidence and the sketch-plan I was satisfied that the defendant whether she was overtaking cyclists or trishaws swerved onto the path of the plaintiff's motor-cycle and collided into the motor-cycle when the plaintiff was riding on his correct side of the road, and in doing so was negligent and liable in damages to the plaintiff.

Defence counsel was urging that the accident was caused because the plaintiff overtook other motor-

cyclists. This was not established in evidence and I did not accept it happened. But I would go on to say that even if it had happened, as long as the plaintiff kept to his path on the road, it is no evidence of negligence. Motor-cyclists like other road users have a right to overtake slower moving vehicles as long as they remain within the confines of their own lanes, do not encroach onto the wrong side of the road and onto the paths of traffic on its correct side of the road and so long as they do not do so recklessly and without consideration for other users of the road.

There were several other submissions made by counsel for defendant on minor discrepancies in the evidence and inconsistencies between pleadings and evidence in court in the case of the plaintiff and his witness, but I was satisfied that these were nothing more than forensic efforts to avoid liability as I saw no substance in the submissions. The issue before the court was whether the accident was caused as a result of the negligent driving of Motor Vehicle No. PA 996 by the defendant. There was no doubt at all in the mind of the court that the accident happened as stated earlier and that it was solely as a result of the negligent driving of the said vehicle by the defendant.

As regards quantum of damages, the parties during the course of the trial had agreed on the sum of $684 as special damages.

According to the evidence plaintiff was a labourer with Lembaga Pengurus Kerajaan Tempatan attached to the Electricity Section. He was earning $160 per month and an average of $40 per month as overtime. He was on full pay leave from date of accident to January 25, 1974, then on half pay from January 27, 1974 to March 11, 1974, and he reported for duty on March 12, 1974. He had no overtime wages because of his condition. Therefore the court awarded $1,580 as special damages for loss of overtime wages. Hence total special damages was $2,264.

The court further awarded him general damages of $27,000 being $6,000 for loss of future earnings and $21,000 for pain and suffering and loss of amenities (Plaintiff suffered 2½" shortening of right lower limb and deformation of the knee joint restricted to about 30° and fixed in an extended position).

Hence the total award was $27,000 general damages with interest at 6% from date of service of writ to judgment, and $2,264 special damages and costs.

Order accordingly.

Solicitors: *Triptipal Singh & Co.; Lim Ewe Hock.*

LEE TECK HUAT v. R & I SECURITIES SDN.

[O.C.J. (Syed Othman J.) June 25, 1977]
[Johore Bahru — Civil Suit No. 208 of 1975]

Practice and Procedure — Applications and Proceedings in Chambers — Appeal from Registrar — 5 day rule — R.S.C. 1957, O. 54 r. 21.

In this case on December 15, 1975 the Senior Assistant Registrar made an order of summary judgment under Order 14 on application by the plaintiff against the defendant. On taking further instructions on December 17, 1975, the solicitor for the defendant filed a notice of appeal against the decision of the Senior Assistant Registrar. On December 18 he asked the Senior Assistant Registrar if the appeal could be made returnable on or before December 20, 1975. The Senior Assistant Registrar told him that was not possible because then the judge was on leave and would only return on December 22 and the earliest date available was January 13, 1976. The Senior Assistant Registrar then gave this date as the day for the hearing of the appeal. Counsel for the appeal (respondent in this appeal) objected to the appeal being heard. He contended that it did not comply with Order 54 rule 21 as it was not made returnable within 5 days and that there should be an application for extension of time.

Held: (1) in dealing with the rule (Order 54 rule 21) it was not enough to consider only the main requirements. Regard must be had to the provision which gave the judge power to allow further time;

(2) where in a notice under this rule (Order 54 rule 21) the Registrar had fixed the time beyond the 5th day, it must be taken that on considering all the circumstances, he, in exercise of the powers conferred by the rule, had allowed further time for the hearing of the appeal. The appellant or his solicitor might make a request to the Registrar for the date of hearing to be within 5 days. But it was a matter for the Registrar to determine whether or not the court would be able to hear the matter on the day fixed. No purpose would be served in giving a mention date if he knew that the judge (in places where there was a single judge) would be in the midst of a criminal trial;

(3) as a matter of practice where further time is allowed, it was desirable that the notice issued should state something to that effect.

Cases referred to:-

(1) *Ahmad bin Yahya & Anor.* v. *Ahmad bin Suleiman* [1972] 2 M.L.J. 109.

(2) *Gooi Seang Tuck* v. *Tan Peng Loon & Anor.* [1959] M.L.J. 153.

CIVIL SUIT.

Chua Jui Meng for the appellant/defendant.

Upali Masacorale for the respondent/plaintiff.

Syed Othman J.: On December 15, 1975 the Senior Assistant Registrar (S.A.R.) made an order of summary judgment under Order 14 on application by the plaintiff against the defendant. On taking further instructions on December 17, 1975, the solicitor for the defendant filed a notice of appeal against the decision of the S.A.R. On December 18 he asked the S.A.R. if the appeal could be made returnable on or before December 20, 1975. The S.A.R. told him that was not possible, because at the time I was on leave and would only return on December 22, 1975, and the earliest date available was January 13, 1976. The S.A.R. then gave this date as the day for hearing of the appeal.

Encik Upali Masacorale, for the plaintiff, (respondent in this appeal) objects to the appeal being heard. He says that it did not comply with Order 54 rule 21 as it was not made returnable within 5 days, and that there should be an application for extension of time.